



**BILLING CODE 5001-06**

**DEPARTMENT OF DEFENSE**

**Office of the Secretary**

**32 CFR Part 275**

**[Docket ID: DOD-2018-OS-0026]**

**RIN 0790-AK01**

**Right to Financial Privacy Act**

**AGENCY:** Department of Defense.

**ACTION:** Final rule.

**SUMMARY:** This rule describes the procedures the Department of Defense (DoD) will follow when seeking access to customer records maintained by financial institutions. These updates fulfill DoD's responsibilities under the Right to Financial Privacy Act.

**DATES:** This final rule is effective on [INSERT DATE 30 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

**FOR FURTHER INFORMATION CONTACT:** Cindy Allard, (703) 571-0086.

**SUPPLEMENTARY INFORMATION:**

**Background**

DoD's current rule was last updated on May 4, 2006 (71 FR 26221). DoD's revisions modified the regulatory text to only include content relating to those instances when the Department submits "formal written requests" to financial institutions for customer records, as described by 12 U.S.C. 3408. On October 29, 2018 the Department of Defense published the proposed rule in the Federal Register at (83 FR 54297-54300). Four commenters provided responses addressing issues within the scope of this rule. The comments are available through the eRulemaking

docket, available online at [www.regulations.gov](http://www.regulations.gov), and then navigating to this rulemaking docket, DOD-2018-OS-0026.

#### Discussion of Comments

All four commenters expressed agreement with the rule. Commenters affirmed the need to protect financial privacy. Based on the comments, DoD is adopting the proposed changes in the final rule without revision. This rule will apply DoD-wide to provide consistent implementation across all components. Upon publication, one component-level rule at 32 CFR part 504 will be rescinded.

#### **Expected Costs and Benefits**

The primary benefit to a DoD-wide rule is consistent implementation across the DoD's responsibilities under the Act. The Act requires DoD to reimburse a financial institution for such costs as are reasonably necessary and which have been directly incurred based on the rates of reimbursement established by the Federal Reserve Board in 12 CFR 219.3. The average cost of reimbursement from DoD to financial institutions over the past five years is \$4,328 per year and the Department does not anticipate an increase with the finalization of this rule. DoD has not paid any civil penalties associated with this rule as discussed in the Civil Liability section of the rule.

#### REGULATORY PROCEDURES

#### **Executive Order 12866, "Regulatory Planning and Review" and Executive Order 13563, "Improving Regulation and Regulatory Review"**

Executive Orders 12866 and 13563 direct agencies to assess all costs and benefits of available regulatory alternatives and, if regulation is necessary, to select regulatory approaches that maximize net benefits (including potential economic, environmental, public health and safety

effects, distribute impacts, and equity). Executive Order 13563 emphasizes the importance of quantifying both costs and benefits, of reducing costs, of harmonizing rules, and of promoting flexibility. This rule has not been designated a “significant regulatory action,” under section 3(f) of Executive Order 12866 and was not reviewed by the Office of Management and Budget (OMB).

**Executive Order 13771, “Reducing Regulation and Controlling Regulatory Costs”**

This final rule is not subject to the requirements of EO 13771 (82 CFR 9339, February 3, 2017) because this final rule is not significant under EO 12866.

**Public Law 104-4, “Unfunded Mandates Reform Act” (2 U.S.C. Ch. 25)**

This final rule is not subject to the Unfunded Mandates Reform Act because it does not contain a federal mandate that may result in the expenditure by state, local, and tribal governments, in the aggregate, or by the private sector, of \$100M or more in any one year.

**Public Law 96-354, “Regulatory Flexibility Act” (5 U.S.C. Ch. 6)**

It has been certified that 32 CFR part 275 is not subject to the Regulatory Flexibility Act (5 U.S.C. 601) because it does not have a significant economic impact on a substantial number of small entities.

**Public Law 96-511, “Paperwork Reduction Act” (44 U.S.C. Ch. 35)**

It has been certified that 32 CFR part 275 does not impose reporting or recordkeeping requirements under the Paperwork Reduction Act of 1995.

**Executive Order 13132, “Federalism”**

Executive Order 13132 establishes certain requirements that an agency must meet when it promulgates a proposed rule (and subsequent final rule) that imposes substantial direct requirement costs on state and local governments, preempts state law, or otherwise has

federalism implications. This final rule will not have a substantial effect on state and local governments, or otherwise have federalism implications.

### **List of Subjects in 32 CFR Part 275**

Banks, banking, Credit, Privacy.

Accordingly, 32 CFR part 275 is revised to read as follows:

### **PART 275—RIGHT TO FINANCIAL PRIVACY ACT**

Sec.

275.1 Purpose.

275.2 Definitions.

275.3 Authorization.

275.4 Formal written request.

275.5 Certification.

275.6 Cost reimbursement.

**Authority:** 12 U.S.C. 3401, *et seq.*

#### **§ 275.1 Purpose.**

The purpose of this part is to authorize DoD Components to request financial records from a financial institution pursuant to the formal written request procedure authorized by section 1108 of the Act and to set forth the conditions under which such requests may be made.

#### **§ 275.2 Definitions.**

The terms used in this part have the same meaning as similar terms used in the Right to Financial Privacy Act of 1978, Title XI of Pub. L. 95-630.

*Act* means the Right to Financial Privacy Act of 1978.

*DoD Components* means the law enforcement activities of the Office of the Secretary of Defense, the Military Departments, the Office of the Chairman of the Joint Chiefs of Staff, the Joint Staff, the Combatant Commands, the Office of the Inspector General of the Department of Defense, the Defense Agencies, the DoD Field Activities, and all other organizational entities in the Department of Defense (hereafter referred to as the “DoD Components”).

### **§ 275.3 Authorization.**

The DoD Components are authorized to request financial records of any customer from a financial institution pursuant to a formal written request under the Act only if:

- (a) No administrative summons or subpoena authority reasonably appears to be available to the DoD Component to obtain financial records for the purpose for which the records are sought;
- (b) There is reason to believe that the records sought are relevant to a legitimate law enforcement inquiry and will further that inquiry;
- (c) The request is issued by a supervisory official of a grade designated by the head of the DoD Component. Officials so designated shall not delegate this authority to others;
- (d) The request adheres to the requirements set forth in § 275.4; and
- (e) The notice requirements required by section 1108(4) of the Act, or the requirements pertaining to the delay of notice in section 1109 of the Act, and described in paragraphs (e)(1) through (5) of this section are satisfied, except in situations (e.g., section 1113(g)) where no notice is required.

(1) The notice requirements are satisfied when a copy of the request has been served on the customer or mailed to the customer’s last known address on or before the date on which the request was made to the financial institution together with the following notice which shall state with reasonable specificity the nature of the law enforcement inquiry: “Records or information

concerning your transactions held by the financial institution named in the attached request are being sought by the Department of Defense [or the specific DoD Component] in accordance with the Right to Financial Privacy Act of 1978 for the following purpose:”

(2)(i) Within ten days of service or within fourteen days of mailing of a subpoena, summons, or formal written request, a customer may file a motion to quash an administrative summons or judicial subpoena, or an application to enjoin a Government authority from obtaining financial records pursuant to a formal written request, with copies served upon the Government authority. A motion to quash a judicial subpoena shall be filed in the court that issued the subpoena. A motion to quash an administrative summons or an application to enjoin a Government authority from obtaining records pursuant to a formal written request shall be filed in the appropriate United States District Court. Such motion or application shall contain an affidavit or sworn statement stating:

(A) That the applicant is a customer of the financial institution from which financial records pertaining to said customer have been sought; and

(B) The applicant’s reasons for believing that the financial records sought are not relevant to the legitimate law enforcement inquiry stated by the Government authority in its notice, or that there has not been substantial compliance within the provisions of the Act.

(ii) Service shall be made upon a Government authority by delivering or mailing by registered or certified mail a copy of the papers to the person, office, or department specified in the notice which the customer has received a request.

(3) If a customer desires that such records or information not be made available, the customer must:

(i) Fill out the accompanying motion paper and sworn statement or write one of the customer's own, stating that he or she is the customer whose records are being requested by the Government and either giving the reasons the customer believes that the records are not relevant to the legitimate law enforcement inquiry stated in this notice or any other legal basis for objecting to the release of the records.

(ii) File the motion and statement by mailing or delivering them to the clerk at an appropriate United States District Court.

(iii) Serve the Government authority requesting the records by mailing or delivering a copy of the motion and statement to the Government authority.

(iv) Be prepared to go to court and present the customer's position in further detail.

(v) The customer does not need to have a lawyer, although he or she may wish to employ a lawyer to represent the customer and protect the customer's rights.

(4) If the customer does not follow the procedures in paragraphs (e)(2) and (3) of this section, upon the expiration of ten days from the date of service or fourteen days from the date of mailing of the notice, the records or information requested therein may be made available. The records may be transferred to other Government authorities for legitimate law enforcement inquiries, in which event the customer will be notified after the transfer.

(5) Also, the records or information requested therein may be made available if ten days have expired from the date of service or fourteen days from the date of mailing of the notice and within such time period the customer has not filed a sworn statement and an application to enjoin the Government authority in an appropriate court, or the customer challenge provisions.

**§ 275.4 Formal written request.**

(a) The formal written request must be in the form of a letter or memorandum to an appropriate official of the financial institution from which financial records are requested. The request shall be signed by the issuing official, and shall set forth that official's name, title, business address, and business phone number. The request shall also contain the following:

- (1) The identity of the customer or customers to whom the records pertain;
- (2) A reasonable description of the records sought; and
- (3) Such additional information which may be appropriate – e.g., the date when the opportunity for the customer to challenge the formal written request expires, the date on which the DoD Component expects to present a certificate of compliance with the applicable provisions of the Act, the name and title of the individual (if known) to whom disclosure is to be made.

(b) In cases where customer notice is delayed by court order, a copy of the court order must be attached to the formal written request.

#### **§ 275.5 Certification.**

Before obtaining the requested records pursuant to a formal written request described in § 275.4, an official of a rank designated by the head of the requesting DoD Component shall certify in writing to the financial institution that the DoD Component has complied with the applicable provisions of the Act.

#### **§ 275.6 Cost reimbursement.**

Cost reimbursement to financial institutions for providing financial records will be made consistent with 12 CFR part 219, subpart A.

Dated: May 22, 2019.

Aaron T. Siegel,



Alternate OSD Federal Register

Liaison Officer, Department of Defense.

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